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NOTES

GONZALES V. CITY OF BOZEMAN: THE PUBLIC DUTY DOCTRINE'S UNCONSTITUTIONAL TREATMENT OF GOVERNMENT DEFENDANTS IN TORT CLAIMS

Lee C. Baxter*

I. INTRODUCTION

With the ratification of its Constitution in 1972, Montana became the first and only state in the Union to abolish sovereign immunity through constitutional fiat.¹ This enactment meant government entities in Montana were no longer immune from negligence suits.² If a government actor injured an individual, the individual could gain redress. However, for almost 40 years, government immunity has continued in Montana courts under a different name—the public duty doctrine. Recently, in *Gonzales v. City of Bozeman*, the Montana Supreme Court applied the public duty doctrine and held that law enforcement officers responding to a robbery did not owe a duty to protect a hostage because the officers only owed a duty to protect the public in general.³ The *Gonzales* Court's holding is not only logically

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1. Barry L. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 Mont. L. Rev. 283, 283 (1973).

2. Mont. Const. art. II, § 18 provides: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."

3. *Gonzales v. City of Bozeman*, 217 P.3d 487, 494 (Mont. 2009).

perplexing,⁴ but is based on an unconstitutional vestige of sovereign immunity.⁵

The purpose of this note is twofold. First, it will demonstrate why the public duty doctrine is incompatible with Montana law. Second, it affirms for the practitioner that the doctrine's viability is open to challenge if properly brought before the Court. Sections II and III provide brief overviews of the sovereign immunity doctrine and the public duty doctrine, respectively. Section IV offers an analysis of the *Gonzales* opinion. This note argues that the public duty doctrine is unconstitutional and violates statutory provisions. Further, it asserts that Montana public policy favors the doctrine's abolishment. Notwithstanding this determination, section V concludes that the *Gonzales* Court correctly refrained from ruling on the viability of the doctrine because neither party properly raised the question before the Court.

II. THE HISTORY OF SOVEREIGN IMMUNITY AND ITS PLACE IN MONTANA JURISPRUDENCE

Sovereign immunity is a holdover from medieval legal thinking. Under the doctrine of sovereign immunity, a government entity is not liable for the torts its employees commit in the scope of their employment.⁶ Sovereign immunity in America is derived from English common law and the writings of Sir William Blackstone.⁷ Blackstone's well-known commentary proffered two rationales behind immunity: (1) the King, as a divine ruler, answered to no one; and (2) collecting an adverse judgment from the King would be problematic.⁸ In 1788, the King's Bench articulated a fiscal rationale for sovereign immunity in *Russell v. Men of Devon*.⁹ In *Russell*, the plaintiff's wagon was damaged when he drove across a dilapidated bridge.¹⁰ The Bench denied recovery because "it is better that an individual

4. *Id.* at 503 (Nelson, J., dissenting).

5. *Id.* at 501.

6. John A. Kutzman, *The King's Resurrection: Sovereign Immunity Returns to Montana*, 51 Mont. L. Rev. 529, 529 (1990) (citing W. Prosser & P. Keeton, *The Law of Torts* 1032 (5th ed., 1984)) ("Immunity . . . admits the occurrence of the tort but excuses it on grounds of social policy."); Hjort, *supra* n. 1, at 283.

7. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 26–27 (2002).

8. William Blackstone, *Commentaries on the Law of England* vol. 1, 242 (J. B. Lippincott Co. 1895). The passage reads in pertinent part: "[The king] owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who . . . shall command the king?"

9. *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788).

10. *Id.* at 359–360.

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 301

should sustain an injury than that the public should suffer an inconvenience.”¹¹

In the 1800s, sovereign immunity spread to the United States and the Montana Territory. Soon after the United States gained independence, American courts adopted the doctrine of sovereign immunity to insulate the government from suit.¹² In *Cohens v. Virginia*,¹³ Chief Justice John Marshall’s approval of sovereign immunity entrenched the doctrine in American jurisprudence.¹⁴ In 1868, the Montana Territorial Supreme Court adopted sovereign immunity in the aptly named decision *Langford v. King*.¹⁵ The Montana Supreme Court continued to hold government defendants immune from lawsuits until 1973, when Montana’s newly ratified constitution became binding on the Court.¹⁶

III. THE ORIGIN OF THE PUBLIC DUTY DOCTRINE AND ITS MONTANA PROGENY

The public duty doctrine originated in the 1855 United States Supreme Court decision *South v. Maryland*.¹⁷ In *South*, the plaintiff alleged he was kidnapped, held for four days, and released only when he paid a ransom.¹⁸ The plaintiff also claimed that the local sheriff knew of the kidnapping and the plaintiff’s location but did nothing to help him.¹⁹ Applying English common law, the Court dismissed the case because the officer did not owe a duty to protect the plaintiff.²⁰ The Court held that it was an undisputed principle of common law that an officer acting in his official capacity could not be sued because he owed a duty to the public in general and not to individual citizens.²¹ The public duty doctrine was born.

In 1976, Alaska became the first jurisdiction to reject the public duty doctrine.²² In *Adams v. State*, a state fire inspector discovered extreme fire

11. *Id.* at 362.

12. The Supreme Judicial Court of Massachusetts adopted the doctrine articulated in *Russell in Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812).

13. *Cohens v. Va.*, 19 U.S. 264 (1821).

14. Hjort, *supra* n. 1, at 285.

15. *Langford v. King*, 1 Mont. 33, 38 (1868) (holding that “unless permitted by some law of this Territory, or of the general government, no citizen of Montana Territory can sue it”).

16. *Noll v. City of Bozeman*, 534 P.2d 880, 881 (Mont. 1975). Mont. Const. art. II, §18 originally read: “The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property.”

17. *South v. Md.*, 59 U.S. 396 (1855).

18. *Id.* at 398.

19. *Id.* at 400–401.

20. *Id.* at 403 (holding that a peace officer performs “a public duty, for neglect of which he is amendable to the public, and punishable by indictment only”).

21. *Id.* at 402–403.

22. John C. McMillan, Jr., *Government Liability and the Public Duty Doctrine*, 32 Vill. L. Rev. 505, 520–521 (1987).

hazards in a hotel and promised to write a letter to the hotel manager detailing the violations so they could be corrected.²³ The hotel manager attempted to obtain the letter, but the inspector never sent it.²⁴ Eight months later, a fire in the hotel trapped and killed five people.²⁵ During the lawsuit that followed, the State of Alaska raised the public duty doctrine as an affirmative defense: as a public entity, the State only owed a duty to the public generally, not to an individual.²⁶ The Alaska Supreme Court rejected the State's argument and held that the public duty doctrine's "duty to all, duty to no one" rationale was a form of sovereign immunity that could only be enacted by the Legislature.²⁷

As of 2004, at least 13 states had abolished the use of the public duty doctrine.²⁸ Generally, these courts reason that the doctrine cannot survive the abolition of sovereign immunity²⁹ because the "duty to all, duty to no one" rationale results in common law governmental immunity.³⁰

However, Montana continues to apply the doctrine. In 1949, the Montana Supreme Court adopted the doctrine in *Annala v. McLeod*.³¹ In *Annala*, the Court held that a landowner could not sue a sheriff or the local government for failing to protect property during a riot because the defendants owed a duty to the public, not to individual citizens.³² The Court determined that in the absence of a statutory provision, civil liability would be determined by the common law principle articulated in *South*.³³

In 2008, the Montana Supreme Court applied the public duty doctrine in *Nelson v. State*,³⁴ barring the plaintiff's claim.³⁵ The State of California had revoked a physician's license for ten years because of his "unprofessional conduct."³⁶ The physician then moved to Montana and the following year was cleared to practice by the Montana Board of Medical Examiners³⁷

23. *Adams v. State*, 555 P.2d 235, 238 (Alaska 1976).

24. *Id.* at 239.

25. *Id.* at 236.

26. *Id.* at 241.

27. *Id.*

28. *Natrona Co. v. Blake*, 81 P.3d 948, 958 (Wyo. 2003) (Golden, J., dissenting) (citing John H. Derrick, *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed under Circumstances*, 38 A.L.R. 4th 1194 (1985 & Supp. 2001)).

29. *Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986); *Com. Carrier Corp. v. Indian River Co.*, 371 So. 2d 1010, 1015 (Fla. 1979); *Beaudrie v. Henderson*, 631 N.W.2d 308, 314 (Mich. 2001); *Doucette v. Town of Bristol*, 635 A.2d 1387, 1390 (N.H. 1993); *Natrona Co.*, 81 P.3d at 954 (Wyo. 2003).

30. *Gonzales*, 217 P.3d at 506 (Nelson, J., dissenting) (citing *Beaudrie*, 631 N.W.2d at 314).

31. *Annala v. McLeod*, 206 P.2d 811, 813 (Mont. 1949).

32. *Id.* at 812–813.

33. *Id.* at 813–815.

34. *Nelson v. State*, 195 P.3d 293 (Mont. 2008).

35. *Id.* at 300, 303.

36. *Id.* at 295.

37. *Id.*

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 303

even though his medical license application revealed alcohol abuse, Demerol addiction, and 11 malpractice suits.³⁸ Three years later, the doctor examined Jack Nelson and sent him home after noting a possible abdominal aneurysm.³⁹ Nelson died from the aneurysm days later.⁴⁰ Nelson's wife sued the Board claiming it negligently granted the physician a license to practice medicine.⁴¹ The Montana Supreme Court held that the Board did not owe a duty to protect Nelson individually from unprofessional, unqualified, and corrupt physicians because it only owed a duty to protect the public against such physicians.⁴² The *Nelson* Court further articulated that the public duty doctrine would not bar recovery if a plaintiff could establish he had a "special relationship" with the government defendant:

A special relationship can be established in *one of four ways*: (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.⁴³

Therefore, in Montana, the public duty doctrine prohibits a plaintiff from recovering from a government defendant that owes a duty to protect the public, unless one of the *Nelson* special-relationship exceptions applies.

IV. GONZALES V. CITY OF BOZEMAN

A. Facts

On April 3, 2005, at 9:55 p.m., Jose Mario Gonzalez-Menjivar entered the Bozeman East Main Town Pump gas station with the intent to commit robbery.⁴⁴ Leah Gonzales, who was six months pregnant,⁴⁵ was working alone at the Town Pump.⁴⁶ Menjivar held a knife to Gonzales's throat and demanded she give him "all the money."⁴⁷ Without Menjivar noticing, Gonzales managed to surreptitiously dial "9-1-1" on her cell phone.⁴⁸

38. *Id.*

39. *Id.*

40. *Nelson*, 195 P.3d at 295.

41. *Id.*

42. *Id.* at 302. The *Nelson* Court looked at the statute enacting the medical board and determined that the "intended beneficiaries" were all the citizens of the state, not individual patients. *Id.*

43. *Id.* at 300 (emphasis added).

44. *Gonzales*, 217 P.3d at 489 (majority).

45. Br. of Appellant at 2, *Gonzales*, 217 P.3d 487.

46. *Gonzales*, 217 P.3d at 489.

47. *Id.*

48. *Id.*

The Gallatin County 911 Communications Department received the call.⁴⁹ Dispatchers heard enough to determine that a robbery was in progress.⁵⁰ Using a law enforcement database and a phone book, they ascertained Leah Gonzales, an East Main Town Pump employee, owned the cell phone.⁵¹ The dispatchers immediately informed the Bozeman Police that a robbery was likely in progress at the Town Pump.⁵²

The first officers arrived approximately four minutes after dispatchers received Gonzales's call.⁵³ The commanding officer at the scene, Sergeant Megargel, directed the officers to establish a perimeter around the building.⁵⁴ One officer approached the building and discovered an open door but then retreated.⁵⁵ Meanwhile, backup from the Bozeman Police and Gallatin County Sheriff's Department arrived.⁵⁶

Inside the Town Pump, Menjivar discovered Gonzales's cell phone and closed it.⁵⁷ Dispatchers, unable to get an answer when they called the cell phone, called the Town Pump landline.⁵⁸ Menjivar picked up the ringing phone, accidentally pushed the "talk" button, and put it in his pocket.⁵⁹ Dispatchers discerned a female and male voice, but little else because voices were muffled by Menjivar's pocket.⁶⁰

While the police were outside, Menjivar forced Gonzales into the bathroom and raped her.⁶¹ The three dispatchers listening to the phone in Menjivar's pocket were unable to determine that a rape was in progress.⁶² The officers on the scene knew there were two people inside the Town Pump but did not know if there were any others.⁶³ Believing there could be a hostage situation, Sergeant Megargel called in a K-9 Unit.⁶⁴

After raping Gonzales, Menjivar forced her back to the store safe and ordered her to withdraw more money.⁶⁵ At 10:28 p.m., Menjivar left the store and was apprehended by the police.⁶⁶ The K-9 officer ordered that

49. *Id.*

50. Br. of Appellees Gallatin Co., Montana et al. at 3, *Gonzales*, 217 P.3d 487.

51. *Gonzales*, 217 P.3d at 489.

52. Br. of Appellees, *supra* n. 50, at 4.

53. *Id.*

54. *Gonzales*, 217 P.3d at 489.

55. *Id.*

56. Br. of Appellant, *supra* n. 45, at 4.

57. *Gonzales*, 217 P.3d at 489.

58. *Id.* at 489–490.

59. *Id.* at 490.

60. *Id.*

61. Br. of Appellant, *supra* n. 45, at 3.

62. Br. of Appellees, *supra* n. 50, at 5.

63. Br. of Appellees City of Bozeman; Bozeman Police Dept. at 4, *Gonzales*, 217 P.3d 487.

64. *Gonzales*, 217 P.3d at 490.

65. *Id.*

66. *Id.*

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 305

anyone else inside should come out or he would release the dog into the store.⁶⁷ Gonzales, who had retreated into a cooler,⁶⁸ heard the police and exited the store barefoot and in her Town Pump apron.⁶⁹ She was ordered to show her hands and lie on the ground.⁷⁰ Officer Anderson recognized Gonzales as a Town Pump employee and knew that she was pregnant.⁷¹ Still, Anderson handcuffed Gonzales and held her on the ground for approximately 30 seconds while performing a pat-down search.⁷² Gonzales then told Anderson she was raped.⁷³ After the search was completed, Anderson helped Gonzales to her feet, escorted her to the police car, and drove her to the hospital.⁷⁴

B. Procedural History

Gonzales brought suit in state court against the City of Bozeman, Galatin County law enforcement agencies, several officers individually, and Town Pump.⁷⁵ Gonzales claimed the law enforcement agencies negligently responded to the robbery and unlawfully arrested her when she exited the store.⁷⁶ Defendants answered that the public duty doctrine barred Gonzales's negligence claim because she failed to satisfy any of the four *Nelson* exceptions.⁷⁷ On the second claim, defendants answered that Gonzales was not arrested but merely detained briefly for safety purposes that were warranted in the situation.⁷⁸

The law enforcement agencies removed the action to federal district court, where the court granted summary judgment in favor of the defendants on all claims brought under Title 42 U.S.C. § 1983.⁷⁹ Gonzales refiled her action in state court and settled her unsafe workplace claims with Town Pump.⁸⁰ The district court granted summary judgment for the re-

67. *Id.*

68. Br. of Appellant, *supra* n. 45, at 4.

69. *Gonzales*, 217 P.3d at 490.

70. *Id.*

71. Br. of Appellant, *supra* n. 45, at 5.

72. *Gonzales*, 217 P.3d at 490.

73. *Id.*

74. *Id.*

75. *Id.* at 489, 491.

76. *Id.* at 491.

77. Br. of Appellees, *supra* n. 63, at 6–7; Br. of Appellees, *supra* n. 50, at 10; Br. of Appellees Kaycee Anderson and Greg Megargel at 17, *Gonzales*, 217 P.3d at 487.

78. Br. of Appellees, *supra* n. 63, at 7; Br. of Appellees, *supra* n. 50, at 18; Br. of Appellees, *supra* n. 77, at 17.

79. *Gonzales*, 217 P.3d at 491.

80. *Id.*

maining defendants,⁸¹ and Gonzales appealed to the Montana Supreme Court.⁸²

C. Majority Holding

In a four-to-three majority opinion authored by Chief Justice Mike McGrath, the Montana Supreme Court affirmed the district court's orders granting summary judgment to the defendants on both of Gonzales's claims.⁸³ Six justices joined or concurred on issue one, that the public duty doctrine barred Gonzales's negligence claim.⁸⁴ Four justices joined on issue two, that the police's detention of Gonzales when she exited the Town Pump was lawful.⁸⁵

The majority did not address the viability of the public duty doctrine. However, applying the public duty doctrine and the *Nelson* exceptions, the Court held that absent a special relationship, a police officer owes no duty to a victim of a crime and cannot be held liable civilly.⁸⁶ The Court determined that none of the special relationship exceptions applied. First, the police did not have custody of Menjivar or Gonzales when they surrounded the Town Pump; thus, the fourth *Nelson* exception of "actual custody or control" did not apply.⁸⁷ Second, the police did not take specific actions to protect Gonzales until she exited the store; thus, the second *Nelson* exception did not apply.⁸⁸ Finally, Gonzales did not know she had successfully reached anyone when she managed to dial 911; therefore, Gonzalez did not satisfy the third *Nelson* exception of "detrimental reliance."⁸⁹ The majority also affirmed the district court's decision that the stop of Gonzales when she exited the Town Pump was a lawful *Terry* stop.⁹⁰

D. Concurring and Dissenting Opinions

Justice Leaphart concurred with the majority that Gonzales's claim was barred by the public duty doctrine.⁹¹ He refused to address the constitutionality of the doctrine because no party raised the issue on appeal.⁹² On

81. *Id.*

82. *Id.* at 489.

83. *Id.* at 494.

84. *Id.* at 489, 494; *id.* at 494 (Leaphart, J., concurring in part and dissenting in part); *id.* at 496 (Cotter, J., concurring in part and dissenting in part).

85. *Gonzales*, 217 P.3d at 489, 494 (majority).

86. *Id.* at 491.

87. *Id.* at 492.

88. *Id.* at 493.

89. *Id.*

90. *Id.* at 494.

91. *Gonzales*, 217 P.3d at 494 (Leaphart, J., concurring and dissenting).

92. *Id.* at 495–496.

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 307

issue two, Justice Leaphart dissented from the majority, stating that whether Gonzales was lawfully detained was a question of fact not appropriate for summary judgment disposal.⁹³

On issue one, Justice Cotter concurred with the majority, reasoning that a party needed to raise the viability of the public duty doctrine for the Court to discuss it.⁹⁴ Justice Cotter concurred with Justice Leaphart on issue two, asserting that whether the police were justified in handcuffing and forcing Gonzales to the ground was a question of fact to be determined by a jury.⁹⁵

Justice Nelson dissented from the majority on issue one.⁹⁶ He argued that the Court incorrectly applied the *Nelson* exceptions⁹⁷ and, alternatively, that the public duty doctrine is unconstitutional and contrary to statutory law.⁹⁸ Justice Nelson contended that the defendants owed a duty to Gonzalez because they created a *Nelson* special-relationship when they abandoned their routine patrols to respond to the Town Pump robbery.⁹⁹ He further argued that the public duty doctrine was unconstitutional because it was a form of sovereign immunity abolished by Montana's Constitution and statutes.¹⁰⁰ Because the defendants used the doctrine as an affirmative defense and Gonzales disputed its applicability, Justice Nelson contended that the doctrine's viability was at issue.¹⁰¹ In his opinion, the Court was not bound to follow blindly the arguments of the parties on appeal.¹⁰² Justice Nelson also dissented from the majority on issue two, stating that whether police were justified in handcuffing and forcing Gonzales to the ground was a question of fact for a jury to decide.¹⁰³

V. ANALYSIS OF THE PUBLIC DUTY DOCTRINE'S VIABILITY IN MONTANA

The *Gonzales* opinion is significant for what it did not decide: the constitutional and statutory viability of the public duty doctrine. Because no party raised the viability of the doctrine on appeal, the Court properly restrained itself from addressing the issue. However, notwithstanding the Court's restraint, the public duty doctrine is unquestionably unconstitutional, contrary to statutory mandate, and it impedes Montana public policy.

93. *Id.* at 495.

94. *Id.*

95. *Id.* at 496 (Cotter, J., concurring and dissenting).

96. *Id.* at 496, 508 (Nelson, J., dissenting).

97. *Gonzales*, 217 P.3d at 496 (Nelson, J., dissenting).

98. *Id.* at 506.

99. *Id.* at 499–501.

100. *Id.* at 501.

101. *Id.* at 505.

102. *Id.*

103. *Gonzales*, 217 P.3d at 496.

A. *The Public Duty Doctrine Is a Form of Sovereign Immunity
Abolished by the Montana Constitution*

The Montana Constitution, through its abolishment of sovereign immunity, requires that Montana courts give no special treatment to government defendants unless the Legislature enacts an exception.¹⁰⁴ Because the public duty doctrine violates this mandate, it is unconstitutional. Although the public duty doctrine is different procedurally than the sovereign immunity doctrine,¹⁰⁵ its effect is the same: government defendants are shielded from liability because of their governmental status.¹⁰⁶

Typically, to succeed in a negligence claim, a plaintiff must establish the defendant owed her a legal duty, which he breached, and that the breach caused her injury.¹⁰⁷ The public duty doctrine provides governmental immunity by preventing the plaintiff from establishing the legal duty element. Under the doctrine, a government defendant does not owe a duty to individuals if it owes a duty to the public.¹⁰⁸ Where a “duty to all equals a duty to no one,” governmental defendants do not owe duties that would exist under traditional tort principles. In Montana, duty is a question of law determined by the court.¹⁰⁹ Traditionally, a court will find a defendant owes a duty so long as two requirements are met: (1) imposing a duty comports with public policy; and (2) the plaintiff’s injuries are a reasonable and foreseeable consequence of the defendant’s conduct.¹¹⁰ However, under the public duty doctrine, even if a plaintiff’s injuries are in fact the reasonably foreseeable consequence of a defendant’s conduct, a government defendant might not owe a duty to the plaintiff if the duty is merely owed to the public at large.¹¹¹ This result is inconsistent with the Montana policy that compels courts to treat government defendants the same as nongovernment defendants.¹¹² Because the public duty doctrine shields government defendants from tort liability for which nongovernment actors would otherwise be lia-

104. Mont. Const. art. II, § 18.

105. *Orr v. State*, 106 P.3d 100, 113 (Mont. 2004) (“The sovereign immunity defense does not mean that there is an absence of duty; rather, at the time that the immunity defense exists, the breach of duty is simply not actionable against the sovereign.”).

106. McMillan, *supra* n. 22, at 506.

107. *Lopez v. Great Falls Pre-Release Servs.*, 986 P.2d 1081, 1085 (Mont. 1999), *modified on other grounds*, *Samson v. State*, 69 P.3d 1154, 1159 (2003).

108. McMillan, *supra* n. 22, at 509.

109. *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 607 (Mont. 2008).

110. *Id.*

111. *See Nelson*, 195 P.3d 293. The plaintiff’s injuries—death resulting from being sent home after his doctor noted he might have an aneurism—were certainly a foreseeable consequence of the State clearing the doctor to practice in Montana when his medical license had been revoked a year earlier in California. The State was aware of numerous malpractice complaints against the doctor and knew that he had an alcohol problem and had been addicted to Demerol.

112. *See* Mont. Const. art. II, § 18; Mont. Code Ann. §§ 2–9–102, 2–9–101(1).

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 309

ble, the difference between the doctrine and sovereign immunity is merely “theoretical.”¹¹³

Other jurisdictions have recognized that although the public duty doctrine disguises sovereign immunity, its effect is the same. The Colorado Supreme Court held that under both the public duty and sovereign immunity doctrines, existence of liability depends entirely on the defendant’s public status.¹¹⁴ The Wyoming Supreme Court determined that the public duty doctrine could not survive the abolishment of sovereign immunity because its effects are the same.¹¹⁵ And as indicated above, the Alaska Supreme Court held that the “duty to all, duty to no one” doctrine was in reality a form of sovereign immunity.¹¹⁶ These holdings are particularly pertinent in Montana where the Constitution forbids court favoritism of government defendants without the Legislature’s permission.

The public duty doctrine violates Montana’s Constitution by giving government defendants immunity that the Legislature has not authorized. Article II, § 18 provides: “The state, counties, cities, towns, and all other local governmental entities shall have *no immunity* from suit for injury to a person or property, *except as may be specifically provided by law by a two-thirds vote of each house of the legislature.*”¹¹⁷ Section 18 mandates that absent a legislative enactment, a government defendant enjoys no immunity.¹¹⁸ To date, the Legislature has not enacted a statute that grants the immunity created by the public duty doctrine.¹¹⁹ The doctrine is incompatible with the Montana Constitution.

The public duty doctrine further violates Article II, § 18 by contravening its purpose to expose governmental entities to lawsuits in exactly the same way private entities are exposed. In 1972, the Constitutional Convention delegates discussed their intent to abolish immunity¹²⁰ at all levels of

113. McMillan, *supra* n. 22, at 513; Mark M. Myers, *A Unified Approach to State and Municipal Tort Liability in Washington*, 59 Wash. L. Rev. 533, 537 (1984). In *Adams*, the Alaska Supreme Court noted that a private fire inspector would certainly be held liable for negligently inspecting a building whereas, under the public duty doctrine, a government inspector would have no duty because the duty was only owed to the public in general. *Adams*, 555 P.2d at 241.

114. *Leake*, 720 P.2d at 160.

115. *Natrona Co.*, 81 P.3d at 954 (“The public-duty/special-duty rule was in essence a form of sovereign immunity and viable when sovereign immunity was the rule. The legislature has abolished sovereign immunity in this area. The public duty only rule, if it ever was recognized in Wyoming, is no longer viable.”).

116. *Adams*, 555 P.2d at 241.

117. Mont. Const. art. II, § 18 (emphasis added).

118. *Id.*

119. Mont. Code Ann. §§ 2–9–111 to 2–9–114 provide statutory immunity enacted by the Legislature.

120. *Montana Constitutional Convention Proceedings* vol. v, 1760–1764 (Mont. Legis. Council 1972) (available at http://courts.mt.gov/library/montana_laws.mcpv).

the government.¹²¹ Notably, the delegates addressed specifically how fire departments and law enforcement agencies would no longer be immune.¹²² Delegate Wade J. Dahood, Chairman of the Bill of Rights Committee, summarized the intent behind § 18:

[I]t is our intention to remove this particular doctrine [government immunity] because the Supreme Court . . . has said, ‘Well we have had it all these years and we don’t want to remove it. . . .’ We submit it’s an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, *regardless of whether he has the status of a government defendant or not*. . . . We think if it’s adopted . . . it’s going to tell our Supreme Court we do not want that doctrine [government immunity] in the State of Montana. Let’s judge cases on the merit, on the principle of what’s right¹²³

This statement demonstrates that the delegates adopted § 18 to abolish explicitly the Court’s preferential treatment of governmental defendants. Article II, § 18, as originally ratified, abolished government immunity completely because it did not include a provision allowing the Legislature to enact exceptions.¹²⁴ The delegates and the people of Montana had spoken clearly: government defendants should be treated the same as private individuals.

Within a year of ratification, voters approved a referendum adding to Article II, § 18 the clause: “except as may be specifically provided by law by a two-thirds vote of each house of the legislature.”¹²⁵ The clause made government immunity possible through legislative enactment. But significantly, the Legislature has not enacted a statute granting the kind of immunity the public duty doctrine affords.

B. The Public Duty Doctrine Violates Montana Statutory Provisions

In 1973, the same year Montana ratified Article II, § 18, the Legislature enacted the Tort Claims Act and the Comprehensive State Insurance Plan (“the Tort Claims Act”)¹²⁶ to end Montana courts’ preferential treatment of government defendants.¹²⁷ Montana Code Annotated § 2–9–102 provides: “Every governmental entity is subject to liability for its torts and

121. Hjort, *supra* n. 1, at 295.

122. *Montana Constitutional Convention Proceedings*, *supra* n. 120, at vol. v, 1763.

123. *Id.* at 1764 (emphasis added).

124. *Massee v. Thompson*, 90 P.3d 394, 413 (Mont. 2004) (Nelson, J., dissenting). The original § 18 did not include the provision that allowed the Legislature to enact immunity with a 2/3 vote in each house. *Id.* at 409; Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide*, 63–64 (Greenwood Press 2001).

125. *Massee*, 90 P.3d at 413.

126. The Tort Claims Act and the Comprehensive State Insurance Plan are codified in Title 2, Chapter 9 of the Montana Code Annotated.

127. *Id.* at 409.

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 311

those of its employees acting within the scope of their employment or duties . . . *except as specifically provided by the legislature . . .*”¹²⁸ Furthermore, § 2–9–101(1) explains that a government entity is liable if a private person in the same or similar circumstances would also be liable.¹²⁹

The public duty doctrine violates the Tort Claims Act’s mandate to give no special treatment to government defendants. Section 2–9–102 clearly directs Montana courts to treat a government defendant as a private citizen in a tort suit, absent a legislatively enacted exception. Inherently, the public duty doctrine gives special treatment to government defendants because the defense is available only to government actors. Therefore, the doctrine violates the Act’s provisions.¹³⁰ The doctrine, as applied by Montana courts, also gives preferential treatment to government defendants by requiring plaintiffs to show a “special relationship” to establish a duty.¹³¹ This requirement narrows significantly the number of potential plaintiffs that may bring claims against a government defendant.¹³² Montana courts may not apply the common law where a statute dictates the rule.¹³³ Since the Tort Claims Act is statutory and clearly establishes that government actors be treated the same as private citizens in a tort suit, it controls.

Proponents of the public duty doctrine claim it does not violate the Tort Claims Act because the government provides certain services that private individuals do not.¹³⁴ However attractive this argument might seem, courts have found that distinguishing between governmental and nongovernmental services is a “quagmire” that leads to “inevitable chaos.”¹³⁵ For example, is protecting the public only a government service? Private secur-

128. Mont. Code Ann. § 2–9–102 (emphasis added).

129. *Id.* at § 2–9–101(1). The statute reads: “‘Claim’ means any claim against a governmental entity, for money damages only, that any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity . . . if a private person, would be liable to the claimant for the damages under the laws of the state.”

130. *See Adams*, 555 P.2d at 241–242. The Court stated: “[W]e consider that the ‘duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine.” *Id.* The Court held that “[t]o allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.” *Id.*

131. *Gonzales*, 217 P.3d at 491.

132. Suzanne M. Dardis, *Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity*, 43 S.D. L. Rev. 706, 722 (1998).

133. Mont. Code Ann. § 1–1–108 reads: “In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.”

134. Alexander B. Pungler, *Protecting the Greater Good: A Critique of the Public Duty Doctrine as Applied in Murray v. County of Person*, 88 N.C. L. Rev. 694, 699 (2010) (“Individuals do not have public duties. Thus, without the doctrine, the State could be liable when an individual could not be.”); *Com. Carrier Corp.*, 371 So. 2d at 1017 (government defendant arguing that the government performs activities that a private citizen does not).

135. *Com. Carrier Corp.*, 371 So. 2d at 1017.

ity companies provide many services that police perform. What about private water-treatment companies? Although these companies provide a public service, surely the public duty doctrine would not cover them. More importantly, if accepted, that rationale would undermine the purpose of the Tort Claims Act to hold government actors liable for their negligent acts. In *Adams*, the Alaska Supreme Court articulated the correct analysis in determining whether a government defendant owes a duty: If the defendant was a private entity, would it owe a duty to the plaintiffs?¹³⁶ The *Adams* Court noted that because a private fire inspector owed a duty to carefully inspect a hotel for fire hazards, a government fire inspector owed the same duty.¹³⁷

Montana statutes mandate absent a legislatively enacted exception that courts treat government defendants the same as they would private citizens. Because the public duty doctrine treats government defendants in a preferential way not enacted by the Legislature, it is incompatible with Montana statutory law.

C. *Public Policy Considerations Favor the Abolishment of the Public Duty Doctrine*

The doctrine should be abolished on public policy grounds. In determining whether a defendant owes a plaintiff a legal duty, Montana courts consider whether imposing a duty comports with public policy.¹³⁸ Montana's sole sources of public policy are the state Constitution and legislative statutes.¹³⁹ The intent behind Article II, § 18 and Montana Code Annotated § 2-9-102 is to hold government defendants responsible and allow injured plaintiffs redress. Jurisdictions abolishing the public duty doctrine¹⁴⁰ offer persuasive reasons to consign the public duty doctrine to "the dustbin of history"¹⁴¹ that comport with these goals.

Abolishing the doctrine would allow injured plaintiffs redress and promote government responsibility, accountability, and efficiency. The tort system is designed to reallocate the costs of accidents.¹⁴² The system encourages parties to act reasonably by forcing persons acting negligently to pay damages for unreasonably injuring others. The doctrine undermines

136. *Adams*, 555 P.2d at 241.

137. *Id.*

138. *Fisher*, 181 P.3d at 607.

139. *State ex rel. McCarten v. Corwin*, 177 P.2d 189, 194 (Mont. 1947).

140. *Ficek v. Morken*, 685 N.W.2d 98, 104 (N.D. 2004); *Natrona Co.*, 81 P.3d at 958-959 (Golden, J., dissenting). According to the *Natrona* and *Ficek* courts, as of 2004 at least 20 jurisdictions still used the public duty doctrine in some form, while between 13-15 jurisdictions had abolished it.

141. *Gonzales*, 217 P.3d at 505 (Nelson, J., dissenting).

142. Matthew L. Spitzer, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. Cal. L. Rev. 515, 515 (1977).

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 313

this system by allowing government defendants who act unreasonably to externalize the costs. Without the doctrine, costs for negligent acts would be internalized, forcing departments that suffer judgments to modify practices.¹⁴³ This argument is supported by economic models that find government efficiency is maximized by accountability in tort actions.¹⁴⁴ Moreover, the doctrine's effect is incompatible with a fundamental principle of remedies law—to compensate an injured party for the defendant's wrongful conduct.¹⁴⁵ Under the doctrine, a plaintiff can be left without remedy solely because the defendant is a government actor.¹⁴⁶ The public duty doctrine and the special relationship exceptions leave a foreseeable victim of a tortfeasor's negligent act bearing the costs,¹⁴⁷ even though the government is typically in a better position to absorb damages.¹⁴⁸ This result is contrary to the public policy of Montana that each person is responsible to pay for the damage arising from his negligence.¹⁴⁹ *Gonzales* highlights the problem with the status quo. In Montana, law enforcement officers may respond to a hostage situation, choose to do nothing, and be free from liability. Not only is this result unjust, but it fails to protect the public.

Furthermore, elimination of the public duty doctrine would remove a confusing and illogical concept from Montana jurisprudence.¹⁵⁰ The rationale that “a duty owed to all is a duty owed to none”¹⁵¹ is a *non sequitur*. If a government entity has a duty to the public, clearly it has a duty to those

143. Notes, *Police Liability for Negligent Failure to Prevent Crime*, 94 Harv. L. Rev. 821, 833 (1981).

144. Spitzer, *supra* n. 142, at 548.

145. Douglas Laycock, *Modern American Remedies: Cases and Materials* 14 (4th ed., Aspen Publishers 2010).

146. *Leake*, 720 P.2d at 159.

147. *Adams*, 555 P.2d at 241–242.

148. Notes, *supra* n. 143, at 833–834.

149. Mont. Code Ann. § 27–1–701. The statute reads: “Except as otherwise provided by law, each person is responsible not only for the results of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person except so far as the person has willfully or by want of ordinary care brought the injury upon the person.”

150. See *Ryan v. Ariz.*, 656 P.2d 597, 599 (1982), *superseded by statute*, Ariz. Rev. Stat. §§ 12–820 to 12–826 (2011). Arizona's Supreme Court aptly addressed the frustration of applying the public duty doctrine: “We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery . . . the parameters of duty owed by the state will ordinarily be coextensive with those owed by others.” *Id.* The holding of *Ryan* was superseded in 1984, when the Arizona Legislature passed statutes covering the liability of government employees and entities; however, the statutes “in a sense, codified . . . that the ‘rule is liability and immunity is the exception.’” Andrew Becke, *Two Steps Forward, One Step Back: Arizona's Notice of Claim Requirements and Statute of Limitations Since the Abrogation of State Sovereign Immunity*, 39 Ariz. St. L.J. 247, 253 (2007) (citing *Stone v. Ariz. Hwy. Commn.*, 381 P.2d 107, 112 (Ariz. 1963)).

151. *Gonzales*, 217 P.3d at 507.

individuals that make up the public.¹⁵² When a legislative body charges a government entity with the responsibility to protect the public, that action should create a legal duty.¹⁵³ A breach of that duty—analyzed under conventional negligence principles—should have legal consequences and allow an injured plaintiff to recover damages.

Conventional negligence principles would provide more equitable results while protecting the government from meritless suits.¹⁵⁴ A *prima facie* negligence claim consists of a legal duty on the part of the defendant, breach of that duty, causation, and damages.¹⁵⁵ Government entities would still be protected from frivolous claims by the common law principle of foreseeability.¹⁵⁶ A court using traditional negligence principals to determine a government defendant's liability would conform to Montana's policy of treating government defendants the same as private citizens. This approach would also eliminate the confusion courts face in classifying government actions as public or private.¹⁵⁷

Jurisdictions that continue to apply the public duty doctrine offer two policy rationales for its continued application: (1) the government should be protected against financially devastating lawsuits; and (2) liability would hinder governmental functions by forcing government entities to abandon projects with high liability potential.¹⁵⁸ Both rationales fail to withstand close scrutiny. More importantly, policy concerns are not grounds to ignore constitutional and statutory directives.¹⁵⁹

First, concerns that tort judgments against governments would be endless and would bankrupt local governments are exaggerated and irrelevant. Although abolishment of the public duty doctrine would increase government liability, government entities can soften the impact by taking the simple step of purchasing liability insurance. Tellingly, the Comprehensive State Insurance Plan requires the State to acquire insurance coverage¹⁶⁰ and provides a framework for political subdivisions, such as counties and mu-

152. *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976) (holding a public duty is also a duty owed to individual members of the public).

153. G. Braxton Price, "Inevitable Inequities": *The Public Duty Doctrine and Sovereign Immunity in North Carolina*, 28 Campbell. L. Rev. 271, 282 (2006).

154. *City of Kotzebue v. McLean*, 702 P.2d 1309, 1314 (Alaska 1985). *McLean* is helpful in demonstrating the workability of traditional negligence principles on government defendants. In *McLean*, the Alaska Supreme Court analyzed whether a plaintiff could recover damages from a defendant police officer who failed to respond to the plaintiff's phone call that someone was on the way to kill him. The Court used traditional tort principles and held that the defendant owed the plaintiff a legal duty. *Id.*

155. *Lopez*, 986 P.2d at 1085.

156. Myers, *supra* n. 113, at 542; *Leake*, 720 P.2d at 160.

157. *Jean W. v. Commonwealth*, 610 N.E.2d 305, 313 (Mass. 1993).

158. McMillan, *supra* n. 22, at 513–514; see e.g. *Leake*, 720 P.2d at 159.

159. *Gonzales*, 217 P.3d at 505 (Nelson, J., dissenting).

160. Mont. Code Ann. § 2–9–201(2).

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 315

nicipalities, to procure coverage.¹⁶¹ Commentators and courts have recognized that a municipality or county could and should obtain liability insurance to protect coffers from a significant judgment.¹⁶² Even if a government entity is uninsured or underinsured and cannot afford an adverse judgment, a government's alleged inability to pay should not be a factor. After all, in a private suit, an individual's ability to pay a judgment is a practical consideration but not a prerequisite legal element.¹⁶³ Furthermore, the Montana Legislature has taken steps to reduce the government's exposure to liability by capping tort damages at \$750,000 for each claim and \$1.5 million for each occurrence.¹⁶⁴ The Legislature has also exempted government entities from punitive damages.¹⁶⁵

Second, proponents of the public duty doctrine contend that imposing liability would inhibit the government from pursuing programs that carry a high risk of liability.¹⁶⁶ That argument assumes that it is socially beneficial for governments to pursue risky programs.¹⁶⁷ However, before acting, a responsible government should weigh the benefits against the social cost—including tort liability.¹⁶⁸ For instance, during the second half of the 20th century, the majority of states shifted to allow injured bystanders to sue police officers who caused accidents by engaging in dangerous high-speed pursuits.¹⁶⁹ The states weighed the benefits of apprehending criminals against the danger that high-speed chases posed to the public and concluded that, in certain circumstances, the danger overshadowed the benefits. Moreover, government services do not cease when they become subject to tort liability. In Arizona, when the Supreme Court ended sovereign immunity, the government predicted a standstill; however, as the Court later noted, "Arizona survived" and continued to function.¹⁷⁰ It is important to reaffirm that even if these arguments were persuasive they cannot supersede constitutional and statutory mandate. The Montana Constitution has a safeguard if abolishment proves troublesome. The Legislature can enact a statute to immunize government defendants¹⁷¹ as it has in the past.¹⁷²

161. *Id.* at § 2-9-211(1).

162. *Ryan*, 656 P.2d at 599; *Myers*, *supra* n. 113, at 541.

163. *Myers*, *supra* n. 113, at 541; *McMillan*, *supra* n. 22, at 535 n. 141.

164. Mont. Code Ann. § 2-9-108(1).

165. *Id.* at § 2-9-105.

166. *Myers*, *supra* n. 113, at 542.

167. *See id.*

168. *Id.*

169. *See* Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511, 517 (2006).

170. *Ryan*, 656 P.2d at 598.

171. Mont. Code Ann. § 2-9-102; Mont. Const. art. II, § 18.

172. *See* Mont. Code Ann. §§ 2-9-111 to 2-9-114.

D. The Gonzales Court Properly Restrained Itself from Addressing the Constitutional and Statutory Viability of the Public Duty Doctrine

Six of the seven justices that took part in the *Gonzales* decision did not address the viability of the public duty doctrine because no party challenged the doctrine on appeal.¹⁷³ In abstaining from addressing the doctrine's viability, the Court properly restrained itself from offering a gratuitous constitutional opinion.¹⁷⁴ As a matter of prudence, the Montana Supreme Court should not rule on the constitutionality of the doctrine without being asked to do so. Such a ruling would be inconsistent with the adversarial system of justice¹⁷⁵ and would violate the Court's rule to avoid constitutional questions if possible.¹⁷⁶

The *Gonzales* Court would have undermined the adversarial system by raising the validity of the public duty doctrine *sua sponte*. The heart of the American legal system is the adversarial process.¹⁷⁷ The system requires that counsel act as zealous advocates and that the judge serves as a neutral decision maker.¹⁷⁸ The neutrality requirement for judges reduces the ability to interject personal bias by giving the parties control of the determinative issues.¹⁷⁹ When a judge raises a *sua sponte* argument, neutrality has been replaced by advocacy and the adversarial safeguards are compromised.¹⁸⁰ Justice Scalia has noted the importance of adherence to this system: "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversar[ial] system of justice from the inquisitorial one."¹⁸¹ The *Gonzales* Court properly adhered to the principals of the adversarial system when it refrained from addressing the public duty doctrine's viability.

The long-standing rule that counsel must present an argument for it to be considered by an appellate court helps courts make more informed rulings. Zealous advocates find and present more useful information and arguments than a court could on its own.¹⁸² This "adversarial clash" presents a

173. *Gonzales*, 217 P.3d at 495 (Leaphart, J., concurring in part and dissenting in part).

174. *See Mont. Power Co. v. Carey*, 700 P.2d 989, 990–991 (Mont. 1985).

175. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 262 (2002).

176. *Com. Cause v. Statutory Comm.*, 868 P.2d 604, 607 (Mont. 1994) (citing *Wolfe v. Mont. Dept. of Lab. & Indus.*, 843 P.2d 338, 340 (Mont. 1992)).

177. Milani & Smith, *supra* n. 175, at 274.

178. Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication*, 35 (West 1988).

179. *Id.* at 34.

180. *Id.* at 2.

181. *U.S. v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

182. Milani & Smith, *supra* n. 175, at 273; *see e.g. Kolstad v. Am. Dental Assn.*, 527 U.S. 526, 547 (1999) (Stevens, J., concurring in part and dissenting in part).

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 317

court with the strongest arguments for it to make a fully informed ruling.¹⁸³ In *State v. Zabawa*,¹⁸⁴ Justice Nelson acknowledged this principle:

[I]t is our obligation to decide the cases filed in this Court on the basis of the issues and arguments raised by the parties. In my view the best decisions result where both sides have had the opportunity to vigorously argue and challenge the positions and authorities of the other side. While the temptation is often great to decide a case on the basis of the argument that “should have been made,” but was not, in blinding-siding an issue we run the very real risk of substituting advocacy for neutrality.¹⁸⁵

In *Gonzales*, Justice Leaphart echoed this reasoning. He stated: “In my view, constitutional issues are best left to resolution after a party has raised a constitutional challenge and the issues have been briefed and argued.”¹⁸⁶ Although the system is admittedly imperfect, a court’s deviation from it has more troublesome consequences. A court amplifies the possibility that it will decide a case incorrectly when it raises a dispositive *sua sponte* argument.¹⁸⁷ When this happens, the parties are bound to a ruling that was not only made incorrectly, but is based on an argument neither party asked the court to make.¹⁸⁸

In 1997, the District of Columbia Court of Appeals made such a mistake in *Poyner v. Loftus*.¹⁸⁹ In *Poyner*, the plaintiff, a legally blind man, was injured when he fell off an elevated walkway.¹⁹⁰ The trial judge granted the defendant’s motion for summary judgment on grounds that the plaintiff was contributorily negligent.¹⁹¹ On appeal, the appellate court criticized both parties for failing to cite any authority addressing the standard of care blind people owe to themselves.¹⁹² The court adopted a rule derived from Pennsylvania and Delaware case law, that a blind person is contributorily negligent as a matter of law if he is injured while walking without a

183. Milani & Smith, *supra* n. 175, at 273–275.

184. *State v. Zabawa*, 928 P.2d 151 (Mont. 1996).

185. *Id.* at 158 (Nelson, J., specially concurring). In *Zabawa*, the defendant appealed his criminal conviction on the grounds that his sentence violated the Double Jeopardy Clauses of both the United States and Montana constitutions. However, the defendant only addressed his rights under the United States Constitution and did not allege that the Montana Constitution provided him greater protections than the United States Constitution. Accordingly, the majority opinion addressed only the defendant’s protections under the United States constitutional protections. *Id.* at 153.

186. *Gonzales*, 217 P.2d at 495 (Leaphart, J., concurring in part and dissenting in part). “Nowhere in the five briefs on appeal is there any citation to Article II, sec. 18 of the Montana Constitution or to § 2–9–102, MCA. None of the parties suggest that the Court should retain or reject the public duty doctrine. In other words, the viability of the public duty doctrine was not an issue in this case.” *Id.*

187. Milani & Smith, *supra* n. 175, at 274.

188. *See id.* at 259–262.

189. *Poyner v. Loftus*, 694 A.2d 69 (D.C. App. 1997).

190. *Id.* at 70.

191. *Id.* at 69–70.

192. *Id.* at 71.

guide or cane.¹⁹³ Because the plaintiff was not using a guide or cane at the time of his injury, the court affirmed the trial judge's ruling that the plaintiff was contributorily negligent.¹⁹⁴ However, there was a problem with the court's decision: a District of Columbia statute enacted 25 years earlier stated that a blind person's failure to use a cane or guide could not be used to consider or establish contributory negligence.¹⁹⁵ Not only did the court incorrectly decide the case, but its decision was predicated on an argument not raised by either party. This result is untenable in an adversarial system.

The *Gonzales* Court's restraint was also consistent with the Montana Supreme Court's longstanding policy to avoid constitutional questions when possible.¹⁹⁶ Not only do Montana courts avoid questions of constitutional law, they refuse consistently to address constitutional questions raised for the first time on appeal.¹⁹⁷ Given these restraint policies, the Montana Supreme Court should refrain from ruling on a constitutional question that was never raised by either party at any point. Although the Montana Supreme Court has decided cases based on a *sua sponte* argument, those instances are extremely rare.¹⁹⁸

The *Gonzales* Court was true to its neutral role in the adversarial system and followed its general rule to avoid constitutional questions. Although this note disagrees with Justice Nelson's analysis of the *sua sponte* issue, his dissent served two significant purposes. First, it highlighted the constitutional, statutory, and policy problems of the public duty doctrine in a colorful dissent that likely drew significant attention from the Montana Bar. Second, it affirmed to the Montana practitioner that the doctrine's viability is still open to challenge.

VI. CONCLUSION

The *Gonzales* Court applied the public duty doctrine, a remnant of sovereign immunity, and ended Leah Gonzales's suit against the City of

193. *Id.* at 72–73.

194. *Id.* at 73.

195. Milani & Smith, *supra* n. 175, at 260–261 (citing D.C. Code Ann. § 6–1704 (1981)).

196. *State v. Kolb*, 200 P.3d 504, 506 (Mont. 2009); *State v. Normandy*, 198 P.3d 834, 837 (Mont. 2008); *In re S.H.*, 86 P.3d 1027, 1030 (Mont. 2003); *Merlin Meyers Revocable Trust v. Yellowstone Co.*, 53 P.3d 1268, 1272 (Mont. 2002).

197. *Day v. Payne*, 929 P.2d 864, 866 (Mont. 1996) (citing 5 Am. Jur. 2d *Appellate Review* § 690, 360–361 (1995)). “In Montana, the general rule is that ‘an issue which is presented for the first time to the Supreme Court is untimely and cannot be considered on appeal.’ (citation omitted). The rule applies to both substantive and procedural matters, as well as to a change in a party's theory of a case. It is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.” *Id.*

198. *See Gonzales*, 217 P.3d at 495 (Leaphart, J., concurring in part and dissenting in part).

2011 GONZALES V. BOZEMAN: *THE PUBLIC DUTY DOCTRINE* 319

Bozeman and Gallatin County. The public duty doctrine immunizes government defendants by holding they do not owe a duty to individuals if they owe a duty to the public in general. Not only does the rationale of “a duty to all equals a duty to no one” defy logic, it violates Montana law. Article II, § 18 of the Montana Constitution and § 2–9–102 of the Montana Code Annotated allow government entities to be immune for liability only if the Legislature enacts an exception through a two-thirds vote in both chambers. Because the Legislature has not enacted an exception immunizing government actions protected by the public duty doctrine, the doctrine is unconstitutional and contravenes Montana statutory law. In addition, policy considerations support the abolishment of the doctrine, while the reasons to keep it are unsubstantiated and, more importantly, irrelevant in light of the constitutional and statutory mandates.

Notwithstanding this note’s conclusion regarding the viability of the public duty doctrine, the *Gonzales* Court properly restrained itself from addressing the viability of the doctrine because no party raised the issue on appeal. Therefore, the issue was not before the Court and it would have been improper for the Court to address it. However, the public duty doctrine’s viability is still open to challenge if the practitioner properly presents it to the Court.

